12-21-2015

State v. Cheatham Appellant's Reply Brief Dckt. 43263

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. KEVIN DONALD CHEATHAM, Defendant/Appellant.	)	APPELLANT'S REPLY BRIEF SUPREME COURT NO. 43263 CR-14-00016229

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE RICH CHRISTENSEN
District Judge

JOHN M. ADAMS
Kootenai County Public Defender

JAY LOGSDON
Deputy Public Defender
400 Northwest Blvd.
P.O. Box 9000

Coeur d'Alene, ID 83816

ATTORNEY FOR APPELLANT

LAWRENCE G. WASDEN
Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. KEVIN DONALD CHEATHAM, Defendant/Appellant.	)	APPELLANT'S REPLY BRIEF SUPREME COURT NO. 43263 CR-14-00016229

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE RICH CHRISTENSEN
District Judge

JOHN M. ADAMS
Kootenai County Public Defender

JAY LOGSDON
Deputy Public Defender
400 Northwest Blvd.
P.O. Box 9000

Coeur d'Alene, ID 83816

ATTORNEY FOR APPELLANT

LAWRENCE G. WASDEN
Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

ISSUES ON APPEAL IN VIEW OF THE STATE'S REPONSE

I. Whether a person convicted of Grand Theft may as a condition of probation be prohibited from possessing a firearm.

II. Whether the defendant may be prohibited from living in a dwelling with his family where a firearm is kept no matter the circumstances.

III. Whether the Idaho Department of Corrections may prohibit the defendant from living in a residence where a firearm is kept by another person in a secured location the probationer has no access to because the owner of the firearm is not a member of law enforcement.

ARGUMENT

I.

The state agreed in its brief that the District Court erred in reviewing the defendant's request to amend the terms of his probation as an agency action. The state, however, claims that it cannot be sure whether the District Court applied the wrong standard. From the District Court's written opinion, there can be no doubt that the District Court applied the arbitrary and capricious standard of review. The District Court was required to consider whether the condition placed on the defendant was reasonably related to his probation. *State v. Jones*, 123 Idaho 315, 318 (Ct.App.1993). Moreover, because the term of probation touched on several of the defendant's constitutional rights, the District Court needed to ensure that the term it reviewed did not deprive liberty greater than reasonably necessary. *U.S. v. Wolf Child*, 699 F.3d 1082, 1093 (9th Cir.2012). The District Court clearly did not do this, as it failed to recognize that the determination was its own to make, rather than a simple review of the decision of the Idaho Department of Corrections.

The state also argues that this Court may consider the issues raised by the defendant as the standard of review is *de novo*. The defendant agrees with this in part. The level of review for a term of probation that infringes on a basic fundamental constitutional right is a question for this Court to review, as is the question of whether the Court could prohibit a probationer in the position of the defendant from possessing a firearm. However, even if this Court finds that the District Court had the *ability* to require the defendant not to live with his parents if they kept firearms in the home, it should still remand to allow the District Court to determine if a modified version of the term of probation could be crafted so as to meet the Idaho Department of Correction's safety concerns and

the defendant's right to live with his family. This is particularly true where the Department has admitted that it can make exceptions for those related to law enforcement.

II.

The state argues in its response that because the defendant is a felon he cannot have firearms. This argument does not appear to address anything the defendant argued. Instead, the state has apparently chosen to ignore that the Idaho Legislature has not labeled the defendant as a felon that should lose his right to a firearm. *See*, I.C. §§ 18-3316, 18-310. The word "felon" is not a magic talisman before which the Second Amendment shrivels and fades. The federal Congress recognized that, in view of the over criminalization rampant in our society, simply stating that everyone who is a "felon" has lost the right to a firearm is as absurd as it would be unconstitutional. *See*, 18 U.S.C. § 921(a)(20). Thus, the state's unwillingness to address the actual issue before this Court, whether a person placed on probation for the crime of Grand Theft can possess a firearm, leaves this Court with little by way of argument or authority *against* the defendant's position. Thus, this Court should find for the defendant.

The state's approach to the defendant's second argument is similarly perplexing. The state ignores *People v. Bauer*, 21 Cal.App.3d 937, 944-45 (Cal.Ct.App.1st Dist.1989) *citing People v. Dominguez*, 256 Cal.App.2d 623, 628 (Cal.Ct.App.2nd Dist.1967); *People v. Beach*, 147 Cal.App.3d 612, 620–623 (Cal.Ct.App. 2nd Dist. 1983); *In re Scarborough*, 76 Cal.App.2d 648, 649–651, 173 P.2d 825 (Cal.Ct.App. 3rd Dist. 1946); *People v. Blakeman*, 170 Cal.App.2d 596, 597–599, 339 P.2d 202 (Cal.Ct.App. 1st Dist. 1959); *In re Mannino*, 14 Cal.App.3d 953, 965 (Cal.Ct.App. 1st Dist 1971) *overruled on other grounds by People v. Welch*, 851 P.2d 802 (Cal.1993); *People v. Watkins*, 193 Cal.App.3d 1686 (Cal.Ct.App. 1st Dist. 1987), and simply states, "As a matter of fact, Cheatham

has not been "banished" from anywhere." State's Brief at 10. Whatever "factual banishment" is, it is not at issue in this case. Legal banishment, however, is, and as the authorities cited demonstrate, it is the correct term for what occurred due to the term of probation the defendant seeks to amend.

The state goes on to claim that the protections for the family contained in the Constitution have nothing to do with conditions of probation as to whether a person may live with their family if their family has firearms no matter how little access the defendant has to those firearms. On the contrary, conditions of probation must take heed of the values contained in the Constitution. *Wolf Child*, 699 F.3d at 1093. The state's argument, that a court need not take heed of terms of probation that infringe on constitutional rights, is that which has been flatly rejected by other jurisdictions. *See, e.g., U.S. v. Burns*, 775 F.3d 1221 (10th Cir.2014); *U.S. v. Tome*, 611 F.3d 1371 (11th Cir.2010). The state attempts to twist the defendant's argument into one in which he is claiming the absolute right to live with firearms, rather than what he argued, which was that some reasonable steps could be taken to ensure that the defendant has no access to the firearms owned by his parents. The District Court, of course, did not attempt to do so because it deferred to the Idaho Department of Corrections. Thus, this Court should reverse, with instructions that the District Court consider less intrusive alternatives to the Department's "if the guns stay the probationer cannot" approach.

Lastly, the state misunderstands an Equal Protection challenge. The state cites to *State v. Hamlin*, 156 Idaho 307 (Ct.App. 2014), for the proposition that if something applies to everyone, it cannot be challenged on equal protection ground. In *Hamlin*, the Court of Appeals found a mentally disabled man could not complain about a law that did not permit people to have sexual relations with the mentally disabled, because it applied to everyone. *Id.* at 316. Here, the defendant is a probationer complaining that other probationers related to law enforcement are treated differently. The state

takes the position that *because* probation treats probationers related to law enforcement differently, those probationers are not similarly situated to the defendant. From the state's standpoint, apparently, no law can ever violate Equal Protection of the laws because if the government is treating people differently, they are automatically not similarly situated. This circular logic, fortunately, is not the law.

In *Taylor v. San Diego County*, 800 F.3d 1164, 1169-70 (9th Cir. 2015), the Ninth Circuit considered two groups of people being civilly detained. The Court held that:

> When conducting an equal protection analysis, we first identify the groups being compared. "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified...." While the group members may differ in some respects, they must be similar in the respects pertinent to the State's policy.

Id. at 1169 (quoting *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064 (9th Cir.2014) (citation omitted in original)). In *Vacco v. Quill*, 521 U.S. 793, 800-01 (1997), the United States Supreme Court reversed a decision of the New York Court of Appeals that had held that "some terminally ill people-those who are on life-support systems-are treated differently from those who are not, in that the former may "hasten death" by ending treatment, but the latter may not "hasten death" through physician-assisted suicide." The Court disagreed, finding:

> Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational. See [*Personnel Administrator of Massachusetts v.*] *Feeney*, [422 U.S. 256,] 272 [(1979)] ("When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern").
>
> The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication

> prescribed by a physician, he is killed by that medication. See, *e.g., People v. Kevorkian*, 447 Mich. 436, 470-472, 527 N.W.2d 714, 728 (1994), cert. denied, 514 U.S. 1083, 115 S.Ct. 1795, 131 L.Ed.2d 723 (1995); *Matter of Conroy*, 98 N.J. 321, 355, 486 A.2d 1209, 1226 (1985) (when feeding tube is removed, death "result[s] ... from [the patient's] underlying medical condition"); *In re Colyer*, 99 Wash.2d 114, 123, 660 P.2d 738, 743 (1983) ("[D]eath which occurs after the removal of life sustaining systems is from natural causes"); American Medical Association, Council on Ethical and Judicial Affairs, Physician-Assisted Suicide, 10 Issues in Law & Medicine 91, 93 (1994) ("When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease").

Id. at 800-01 [footnotes omitted].

In this case, the policy of the Idaho Department of Corrections treats different two groups, those probationers related to law enforcement and those who are not. It makes this distinction, apparently, on the basis of the fact that law enforcement officers need to have guns in the home. In other words, the Department admits that it does not make any kind of inquiry as to whether there is any actual danger posed by the probationer in question. Rather, it uses a blanket policy to disarm and in some cases placed on the street anyone placed under its supervision except when they have relatives in law enforcement. That this smacks of nepotism is clear, but it is also clear that it is plainly unconstitutional. Thus, this Court should reverse.

DATED this 14 day of December, 2015.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: Jay Logsdon
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 17 day of December, 2015, served a true and correct copy of the attached APPELLANT'S REPLY BRIEF via interoffice mail or as otherwise indicated upon the parties as follows:

X	Lawrence G. Wasden Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	[X] First Class Mail [_] Certified Mail [_] Facsimile (208) 854-8071
X	Stephen W Kenyon Clerk of the Courts Idaho Supreme Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	[X] First Class Mail